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RECORD OF ORAL HEARING
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex Parte FRED WEHLING, MARY ALDRITT,
ROBERT E. LEE and JASON A. KALLESTAD

Appeal 2009-008111
Application 10/743,118
Technology Center 1600

Oral Hearing Held: May 11, 2010

Before CAROL A. SPIEGEL, DEMETRA J. MILLS, and
STEPHEN G. WALSH, *Administrative Patent Judges*.

APPEARANCES:

ON BEHALF OF THE APPELLANT:

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1 THE USHER: Calendar No. 42, Appeal No. 2009-8111,
2 Ms. Johnson.

3 JUDGE SPIEGEL: Good morning. We are here for oral arguments
4 on Appeal No. 2009-008111, *ex parte* Wehling, W-e-h-l-i-n-g, Application
5 No. 10/743,118.

6 If counsel would kindly introduce herself? You have 20 minutes and
7 may proceed at your leisure.

8 MS. JOHNSON: Thank you. May it please the Board, Your Honors,
9 my name is Allison Johnson, and I'm here on behalf of the assignee, Lab
10 Technologies, in the matter of U.S. Application 10/743, 118.

11 The decisions by this Board have greater impact on the Examining
12 Corps than any Federal Circuit decision. I know this firsthand. This Board
13 has issued decisions in *In re Miller* in 2007, and *In re Miller* in 2008. Those
14 two decisions were related to entirely different applications and entirely
15 different applicants. But they all involve the same issue, and that was
16 whether or not it's appropriate to issue a 102(b) rejection in a situation in
17 which you have to select from among the various disclosures in a reference,
18 a single reference. The Board held that that's inappropriate to issue it as a
19 102(b) rejection. It's not anticipation. The Board was following the
20 decisions from the Court of Customs and Patent Appeals from 1972 in *In re*
21 *Arkley* and the Federal Circuit's decision in *Net Money Inc. v. Verisign*,
22 which was recently issued in October of 2008. And, again, the decisions
23 state that if you have to select from among the various teachings within a
24 single reference, it's not an anticipation.

25 Why do I bring that up? That information is relevant to this case for a
26 number of reasons but, in particular, when I -- when those decisions came

1 down, and subsequent office actions were issued in different cases, and I
2 received a 102(b) rejection, I would either -- actually, the first time that
3 happened, I called the Director of 1700, and I explained to him that the
4 Examining Corps didn't understand the law. I offered to come in and give a
5 seminar on it. He declined my offer, but asked for the two *In re Miller*
6 decisions. Subsequent to that time, the office actions that have come out of
7 the Examining Corps have not usually included a wrong rejection on the
8 102(b), and if they do, I cite these two cases, the rejection is withdrawn, and
9 optionally, a 103 is issued.

10 Again, I bring this up because I believe that the decision that you
11 make today, or that you make on this case, will have an impact on the
12 Examining Corps. It will provide -- if you find that there is not a prima facie
13 case here, and if your decision sets forth the way in which a prima facie case
14 is established, it will provide guidance to the Examining Corps, it will
15 improve the prosecution, it will improve the quality of the applications that -
16 - the patents that issue on these applications and it will decrease the number
17 of appeals that come to you.

18 I also believe -- the second reason I bring it up is that I believe it's
19 partially relevant to this case because if you can -- in an attempt to decipher
20 the Examiner's Answer, it appears that he may be relying on a similar legal
21 reasoning that's been seen in those previous cases.

22 So I turn now to the first claim, which is directed to a tablet that
23 includes an effervescent composition that includes menthol --

24 JUDGE SPIEGEL: Excuse me, ma'am, but we are dealing with the
25 103 rejection.

26 MS. JOHNSON: We are, absolutely.

1 JUDGE SPIEGEL: Okay.

2 MS. JOHNSON: And you will see -- it will become more clear as we
3 go on. So, the effervescent composition, the tablet includes menthol,
4 eucalyptus oil, an effervescent couple, or an effervescent agent that includes
5 an acid and a base, and then that tablet exhibits a certain property, and that
6 property is the dissolution to a clear solution in 38 degrees C water.

7 JUDGE SPIEGEL: And by a clear solution, you mean non-turbid?

8 MS. JOHNSON: It means visually clear. I think it says that in the
9 application but, if not, it's based on the visual conception by the eye.

10 JUDGE SPIEGEL: But it -- that does mean colorless?

11 MS. JOHNSON: No.

12 JUDGE SPIEGEL: Thank you.

13 MS. JOHNSON: The resulting liquid is observed with the naked eye
14 for clarity. The presence of scum on the surface of the -- okay.
15 Observations are recorded. So, that Claim No. 1 is rejected under 103, over
16 Gioffre, et al., in view of Schobel, or Andersen or Rockliffe. There's no --
17 nothing presented in the Examiner's Answer anywhere in the record that
18 actually establishes a 103 go over Gioffre plus Andersen, or Gioffre plus
19 Rockliffe. So there is -- the rejection appears to be Claim 1, over Gioffre, in
20 view of Schobel. So --

21 JUDGE SPIEGEL: Is it possible that the Examiner incorrectly used
22 or instead of and?

23 MS. JOHNSON: Yeah. Or, it's actually, for whatever reason, instead
24 of breaking it out into the each individual claims and saying 103 Gioffre
25 over blank. Because I believe he -- it appears that he applies those

26

1 secondary references, the second and third secondary references, to other
2 claims.

3 So, going back to one, with Gioffre. So Gioffre discloses dentifrice
4 compositions, which are -- have a cream base that -- basically toothpaste.
5 They're -- he discloses that these dentifrice compositions include an
6 inorganic component that's a Zeolite with adsorbed carbon dioxide on it, and
7 that component creates effervescence when the composition is put in the
8 mouth and exposed to water. It starts to effervescence. And that carbon
9 dioxide that's adsorbed onto that Zeolite is released.

10 And then the base composition includes, among other things, flavor
11 agents and polishing agents, okay. These polishing agents are water
12 insoluble components. The flavor agents are listed in a long list. The list
13 includes about 20 classes or specified types of flavors, and then he sets forth
14 a further specific example, or a list of six flavors that are commonly used.
15 Included in both of these lists are menthol and eucalyptus.

16 Gioffre also then discloses that the -- his composition can be in the
17 form of a tablet, a chewable dental tablet, and then, finally, he also discloses
18 that the composition can optionally include a traditional effervescent couple
19 of an acid and a base. But the idea -- his focus is using the adsorbed carbon
20 dioxide on the Zeolite. So there are all these various, different teachings.
21 And there is no actual teaching of utilizing two flavors. There's no specific
22 teaching utilizing menthol -- utilizing menthol and eucalyptus oil,
23 specifically in the same composition, let alone in a tablet. In addition, none
24 of the examples include menthol and eucalyptus oil, but, more importantly,
25 two of the examples, Examples 3 and 4, include a flavor agent. But
26

1 Examples 5 through 10 do not include a flavor agent. So the flavor agent is
2 clearly optional.

3 Okay. So then how do you arrive at the claimed tablet? Well, you
4 have to go about somehow picking, and choosing and selecting. So in order
5 to get there, you'd have to decide I'm going to make a tablet, instead of the
6 toothpaste composition. I'm going to choose two flavors, when flavors are
7 first of all optional, and secondly, there is no teaching to combine two
8 flavors. Third --

9 JUDGE SPIEGEL: But under KSR, do we really need an expressed
10 teaching to combine two flavors.

11 MS. JOHNSON: You need a reason.

12 JUDGE SPIEGEL: You need a reason.

13 MS. JOHNSON: Right.

14 JUDGE SPIEGEL: But you don't need an expressed teaching, is that
15 correct?

16 MS. JOHNSON: Teaching, right, right. But there must be a reason,
17 the reason must be articulated, okay, and it must be set forth with rational
18 underpinnings.

19 JUDGE WALSH: Can I ask, what is it in the limitations you cited in
20 Claim 1 that is not in Gioffre?

21 MS. JOHNSON: In terms of -- there is nothing, except for the
22 disclosure of a -- forming a tablet, selecting those ingredients, such that
23 you're going to have it dissolve to a clear solution in 38 degrees C water.

24 JUDGE WALSH: Is that -- are you saying that is not in Gioffre?

25 MS. JOHNSON: Correct.

26

1 JUDGE WALSH: A tablet dissolving at 38 degrees to form a clear
2 solution?

3 MS. JOHNSON: Correct.

4 JUDGE WALSH: Where does the Examiner get that indication from?

5 MS. JOHNSON: So he chooses to -- this is where that 102(b) issues
6 comes in. So he says two different things. One, it's inherent. So it's an
7 inherent property of the tablet. So, the tablet, again, as -- I went through the
8 list of things you have to make -- to select, to get the tablet. So that tablet
9 never actually existed. So it cannot have any inherent properties. It
10 doesn't -- it never existed in the part, so that's one reason.

11 JUDGE SPIEGEL: So you're saying that inherency has no part in the
12 103?

13 MS. JOHNSON: For the most part.

14 JUDGE SPIEGEL: Okay.

15 MS. JOHNSON: For the most part.

16 JUDGE SPIEGEL: But not as a per se rule?

17 MS. JOHNSON: Right. The courts have never held that -- I've
18 looked for that case law in hopes to support my position, but no. They
19 frequently find that it doesn't exist, but they don't say that it's per se.

20 JUDGE SPIEGEL: All right.

21 MS. JOHNSON: But in this situation, it would not apply, because it
22 actually -- there is no tablet that actually exists. You'd have to make so
23 many selections to get to that hypothetical tablet. It's a fiction.

24 JUDGE WALSH: Is it --

25 JUDGE SPIEGEL: But we just -- I'm sorry.

26

1 JUDGE WALSH: Is it possible to select components from Gioffre
2 that do not produce a tablet that forms a clear solution when it dissolves?

3 MS. JOHNSON: Well, Gioffre specifically says you have -- that
4 inorganic Zeolite, with adsorbed carbon acid, that's not a water soluble
5 component. And then the polishing agents are specifically described as
6 being water insoluble, at Column 4, lines 59 through 62.

7 JUDGE WALSH: I think that may relate to the question Judge
8 Spiegel asked earlier about the definition of clear being non-turbid, is it?

9 JUDGE SPIEGEL: Correct. So you didn't have particulates in there.

10 MS. JOHNSON: Sufficiently -- yeah.

11 JUDGE SPIEGEL: A solution that is turbid is cloudy.

12 MS. JOHNSON: Yeah. No --

13 JUDGE SPIEGEL: Because it's got little particles in it.

14 MS. JOHNSON: Right.

15 JUDGE SPIEGEL: I was trying to get the definition clear.

16 MS. JOHNSON: In our testimony -- our testimony that sets --

17 JUDGE WALSH: Has the Examiner explained the reason why one
18 would have wanted a tablet that produces a clear solution?

19 MS. JOHNSON: The why. Well, let me tell you, if you've read
20 carefully this Examiner's Answer, it's a little difficult to ascertain what is
21 going on. But he does makes a series of statements. I don't know if they're
22 related to -- initially, I thought they were related to this first rejection. I
23 don't know, in retrospect, whether or not they're related to the mouthwash.
24 So he says, at the bottom of page 8, the fourth paragraph of his Answer, and
25 I hope this is answering your question, if not, just ask.

26

1 It's prima facie obvious to combine two compositions -- no, that's not
2 the one I wanted to talk about. He says -- oh, this is it. So I apologize. Page
3 5 of the Examiner's Answer, second full paragraph. "It's apparent to one of
4 ordinary skill in the art to make such modifications to include these
5 beneficial active agents to maximize effervescent composition effectiveness
6 because making such modification can enhance industrial applicability.
7 There's no evidence on record that these, either the property, or these
8 components together, maximize effervescent composition effectiveness or
9 enhance applicability. "

10 If that's his opinion or if he's relying on some sort of common
11 knowledge, his evidence needs to be submitted, and I cited the section that
12 says that.

13 Now, I don't know if that answered your question directly. Did that?

14 JUDGE WALSH: It did, in part, and you've started with a reference
15 to Page 8, where the Examiner did think that Schobel would have provided a
16 clear solution, is that correct?

17 MS. JOHNSON: And that's the second aspect. So, initially, if you
18 looked at Page 4, he says, at the bottom, second paragraph, he says that this
19 is anticipated. So that's where he gets this 102(b) stuff. So, it's -- he's saying
20 that the dissolution is an inherent property, i.e., kind of a 102. He said
21 "Therefore the claims are anticipated." I mean we follow that logic since it's
22 a 103 rejection.

23 But then, yes, at the bottom of 8, that's his second -- I think that --
24 notice that's not in his basis for the rejection. So it's not supporting his prima
25 facie case. Rather, it's his response to my answer, and he -- or, to my Appeal
26 Brief, and he says -- now he's saying when you take two compositions for

1 the same purpose and you combine them, that's under the law something that
2 you can do and that it's obvious.

3 Well, here's the deal. Schobel is directed to providing and trying to
4 get a therapeutic agent to go into a cold water solution to make a clear
5 solution. And he does that by specifically formulating his therapeutic agent
6 of a specific particle size within a range, and then he also takes one
7 component of the effervescent couple, makes it a certain particle size, and
8 combines those to make his tablet. It is that particle size, coupled with the
9 bulk density of the therapeutic agent that gets into his clear solution. He has
10 examples that demonstrate that the failure of the bulk density to be at a
11 certain value will not result in a clear solution, and he also has evidence in
12 here that his -- in his case, that shows that if it's not within a certain particle
13 size, it's not going to dissolve to form a clear solution. So, again -- but then,
14 beyond that, those solutions are designed to be ingested, taken orally. You
15 put them so that they go into your system systematically through your
16 stomach.

17 Well, Gioffre is for dentifrice, and there's no evidence on record that a
18 dentifrice is typically swallowed, and it's not typically swallowed. And so,
19 you're going to be spitting it out. So what -- plus, there's no need for the
20 clear solution in Gioffre. There's got to be a reason. Why are you going to
21 make the solution clear? What's the motivation?

22 Well, in Gioffre, there isn't one. If it's a tablet, it's being chewed. If
23 it's a toothpaste, it's really not relevant, but it's also -- not need to be
24 dissolved into a clear solution. So that's -- that addresses the -- point. But,
25 beyond that, he doesn't exactly say -- well, how are you going to combine
26 them? Well, how are you going to -- what is the manner in which you're

1 going to combine them? At a minimum, we're entitled to be put on notice as
2 to how that's going to occur.

3 JUDGE SPIEGEL: Would you indulge us and discuss the Andersen
4 reference, please?

5 MS. JOHNSON: Yeah, okay. So then the Andersen reference, that
6 moves on to Claim 31, and --

7 JUDGE SPIEGEL: Well, let's just discuss the Andersen reference.

8 MS. JOHNSON: Okay. Andersen discloses a tablet that uses adipic
9 acid to make it so that it doesn't have to be packaged or manufactured in a
10 hydroscopically-controlled environment. So either adipic acid or adipic
11 hydride. And he uses this, you place the tablet in your mouth, and either just
12 by the action of the saliva in the mouth or an addition of about one ounce of
13 water, you can utilize the tablet as a mouthwash. So there's no reason --
14 nothing in Andersen says you should be using menthol and eucalyptus oil.

15 JUDGE SPIEGEL: However, Andersen does suggest that -- explicitly
16 state that you could put in flavoring ingredients, correct?

17 MS. JOHNSON: Yes.

18 JUDGE SPIEGEL: So if we look at Andersen, we have a tablet that's
19 got an acid base effervescent agent system that has explicit directions to
20 include a flavoring agent, which he doesn't say what it is or how much,
21 correct? And suggests that it dissolves in water, as in your saliva, which
22 would be at approximately 38 degrees Celsius, with total dissolution
23 occurring in about 30 seconds. So, but for the specific flavoring agents,
24 Andersen pretty much covers Claim 1, doesn't it?

25 MS. JOHNSON: No.

26 JUDGE SPIEGEL: No, because what?

1 MS. JOHNSON: First of all, it says that it dissolves, but it doesn't say
2 that it dissolves to a clear solution.

3 JUDGE SPIEGEL: It totally dissolves. Why doesn't that -- if it's
4 totally dissolved, why isn't it a clear solution?

5 MS. JOHNSON: That's not taught. We don't know what he's
6 meaning by totally dissolved.

7 JUDGE SPIEGEL: Is there anything in here that would suggest I've
8 got particulates floating around?

9 MS. JOHNSON: I'm not sure, but do note that there's peppermint
10 powder and chlorophyll in there, and those -- peppermint oil is disclosed in
11 Gioffre, and chlorophyll -- chloroform is disclosed in Gioffre. So why
12 would they suddenly decide to include menthol and eucalyptus? There's got
13 to be a reason. There's got to be a reason why you're suddenly choosing
14 them.

15 JUDGE SPIEGEL: Well, Gioffre says these are very common
16 flavoring agents.

17 MS. JOHNSON: If they are common flavoring agents and commonly
18 used together, then there should be evidence on the record that establishes
19 that. Opinion is not evidence. Opinion evidence is not -- opinion is not
20 evidence. If that's going to be submitted, it needs to be submitted in the
21 record, and it hasn't been. There are rules that govern us. That's what makes
22 this fair. It's not okay to simply waive hands and say I think this would be
23 obvious.

24 Should I continue?

25 JUDGE SPIEGEL: Um-hum.

26

1 MS. JOHNSON: Claims 35, 33 and 36. Claim 33 is directed to a
2 method where you dissolve the tablet in water to form a clear solution and
3 then you inhale vapors emitted by that solution. Nowhere in the record is
4 there any evidence that such method step is taught. Nowhere is there any
5 evidence to dissolve the tablet in water that is at a temperature of 38 degrees
6 C, which is approximately 100 degrees F. Nowhere is there a teaching to
7 dissolve a tablet in boiling water and then inhale vapors from it. There is
8 nothing in the record --

9 JUDGE SPIEGEL: If -- I'm sorry, if the flavoring agent was menthol,
10 wouldn't there inherently be a vapor inhalation when the tablet is placed in
11 the mouth?

12 MS. JOHNSON: So, but have you first dissolved it in water and then
13 inhaled? Does menthol give off a vapor? Yes, it does. But there needs to
14 be a reason why you're actually dissolving it in water to form a solution and
15 then inhaling.

16 JUDGE SPIEGEL: So you're saying that dissolving in your mouth
17 with saliva by itself would not meet this claim, or would not suggest that
18 claimed method?

19 MS. JOHNSON: If a tablet were taught that included menthol and
20 eucalyptus oil, if it were taught, and if it were taught to be placed in the
21 mouth, and it dissolved, and you inhaled vapors, and it was forming a
22 solution, so it's not granular, it's a solution in your mouth, then that would
23 read on the claim. But that's not taught. And it's not -- there's nothing that
24 specifically directs one in the skilled art to select each one of those things
25 and put it in your mouth.

26

1 To continue, the Examiner does not mention anything about inhaling
2 in his basis for his rejection. Rather, he only mentions it in his response to
3 my arguments. Again, he has an obligation to set forth a prima facie case.

4 But what does he say? He says the following, and we're hoping that
5 this then leads us somewhere. He sets forth the rule of law, at the bottom of
6 Page 10, and then he says, "In this case, the -- provides a method where
7 effervescent tablet, when dissolved in water, produces a solution, which
8 makes it uniquely desirable for use as a mouthwash."

9 First, I want to note that at no point does Andersen teach that a
10 solution is uniquely desirable as a mouthwash. That statements has no
11 support. But continuing, "The resulting mouthwash solution will have a
12 dual role of producing an astringent mouthwash, effectively desensitizing
13 action, and which form will lend longer lasting --" he goes into all these
14 properties, none of which are taught, none of which are suggested, and who
15 knows where they're coming from because he cites nothing to support it.

16 Then he says, conclude, "Therefore, when these references are taken
17 together, water temperature is obvious because the prior teaching of
18 dissolution of effervescent tablet to provide a clear solution, which makes it
19 uniquely desirable for use as a mouthwash." This is like circular reasoning.

20 And then, right below that, you have Michael Hartley (ph), the
21 Supervisory Examiner, and Robert A. Wax, Total Quality Appeals
22 Specialist, signing off on that statement.

23 JUDGE SPIEGEL: So, if you could, in --

24 MS. JOHNSON: Pardon?

25 JUDGE SPIEGEL: So, if you could, in two sentences, sum up your
26 strongest arguments, they would be?

1 MS. JOHNSON: There isn't a prima facie case of the obviousness
2 steps for any of the claims. And, ignoring that, there is no direction to
3 specifically select the two flavor agents that are asserted in Gioffre, or the
4 therapeutic agents, as we refer to them. To make it into a tablet, to then
5 make the tablet, and finally, and pick out each of the ingredients, such that
6 you have a clear solution when it dissolves in water. And then, secondly,
7 there is absolutely nothing that teaches inhaling vapor after you create a
8 solution.

9 If you would issue a decision finding that there is not a prima facie
10 case of obviousness, I believe it would give great guidance not only to the
11 Examiners, but to the Supervisors. It would also decrease the number of
12 appeals. It would improve the prosecution of applications improve the
13 quality. I think the only conclusion can be that the application is -- that the
14 claims are not obvious in light of the references cited and a prima facie case
15 has not been established.

16 JUDGE SPIEGEL: So you would like us to rely heavily on *In re*
17 *Khan*?

18 MS. JOHNSON: *In re Khan*. KSR, expressly stated, KSR.
19 Rejections based on obviousness cannot be sustained by mere conclusory
20 statements. There must be some articulated reasoning with some rational
21 underpinning to support the legal conclusion of obviousness. There must be
22 a reason to combine the known elements in the fashion set forth in the claim,
23 and it must be explicitly set forth. The mere identification of each element is
24 insufficient to defeat patentability. Rather, there must be a reason. And
25 you've just cited *Khan*. You've got to have a reason. Those are the rules that
26 we play by.

1 JUDGE MILLS: I just have a general observation. Was this rejection
2 in the case all throughout prosecution? Because I'm wondering why the
3 question wasn't raised during prosecution what rejection you were actually
4 looking at. Why there wasn't some confusion with the ors and the ands. It
5 seems like by this time there was some onus on Appellant to try to clarify
6 the rejection in prosecution.

7 MS. JOHNSON: And I did. During the first response, I said
8 Applicants respectfully request clarification as to the manner in which the
9 references are being combined. And I received back a copy, I believe, of the
10 same Office Action that I was issued in the first instance as a Final. And in
11 that response, I believe I again stated Applicants respectfully request how
12 these references are being combined.

13 At that point, I didn't recognize that the Examiner might be using this
14 as a 102(b), because until -- in the Examiner's Answer, when he started
15 saying anticipated, when the claims are anticipated, that it's inherent that it's
16 anticipated. So, I didn't understand that was an issue. I just asked for
17 clarification as to how are these things being combined, so I can better
18 understand it, and, again, in my Appeal Brief, I made the same statement,
19 and in my Reply Brief, I believe I made the same statement again.

20 JUDGE MILLS: Yeah, it seems like if you're getting that result,
21 maybe you need to go to an SPE or something, if you're not getting your
22 question answered, because by the time you come to the Board, you should
23 seemingly know what the rejection is. I'm very perplexed by that.

24 MS. JOHNSON: Yes.

25 JUDGE MILLS: On the Examiner's side, but I think there is also
26 some onus on Appellants.

1 MS. JOHNSON: And I don't know if you've ever experienced, but if
2 you do call a supervisor, you often achieve the anger of the Examiner, but
3 beyond that, I have, in the past, gone up on the pre-review -- Pre-Appeal
4 Brief Review Conference, expecting the supervisors to be like, oh yeah, you
5 know, this -- and I am not successful. And so, I've been repeatedly not
6 successful, and here, you even have what appears to be the supervisor in the
7 primary. I mean I don't see how I would have success. I have tried. I have
8 asked. You have to be in the trenches to understand what it's like. And I
9 totally understand that you guys are overwhelmed with appeals, and this is
10 one of the reasons why you are.

11 JUDGE MILLS: Okay. I have no other questions.

12 JUDGE SPIEGEL: Well, I thank you very much for coming.

13 MS. JOHNSON: Thank you.

14 JUDGE SPIEGEL: And your case is taken under advisement.

15 MS. JOHNSON: Thank you.

16 Whereupon, the proceedings, at 10:07 a.m., were concluded.